

2802 Crestwood Lane
Kilgore, TX 75662
June 4, 2008

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CHIEF CLERKS OFFICE

VIA U. S. CERTIFIED MAIL

Ms. LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
PO BOX 13087
Austin, TX 78711-3087

RE: WISE SERVICE COMPANY WATER
TCEQ DOCKET NO. 2008-0294-MWD

Dear Ms. Castañuela:


Enclosed for filing are the original and 11 copies of the Fothergill/Russell Family's (Richard and Cathy Fothergill, Catherine Russell, and Rob and Stephanie Fothergill) Reply to Response to Requests for Hearing and Requests for Reconsideration in the above-entitled matter.

A copy of the Reply is also being forwarded to all parties of interest including the Executive Director, the Public Interest Counsel, the Director of the Office of Public Assistance, the Applicant and the requesters at their addresses listed on the attached mailing list.

Sincerely yours,

FOTHERGILL/RUSSELL FAMILY


Dr. Richard W. Fothergill


Cathy Russell Fothergill

Enclosures

cc: See Certificate of Service

CERTIFICATE OF SERVICE

I certify that on June 4, 2008, the original and eleven copies of the FOTHERGILL/RUSSELL FAMILY REPLY TO RESPONSES TO HEARING REQUESTS AND REQUESTS FOR RECONSIDERATION for TPDES Permit No. WQ0014708001 was mailed to the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was mailed to all persons on the mailing list.

Cathy Russell Fothergill
Cathy Russell Fothergill

MAILING LIST
WISE SERVICE COMPANY WATER
TCEQ DOCKET NO. 2008-0294-MWD; PERMIT NO. WQ0014708001

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TCEQ DOCKET NUMBER 2008-0294-MWD

Application by	§	Before the
Wise Service Company—Water	§	TEXAS COMMISSION ON
TPDES Permit No. WQ0014708001	§	ENVIRONMENTAL QUALITY

**FOTHERGILL/RUSSELL FAMILY REPLY TO RESPONSES TO HEARING
REQUESTS AND REQUESTS FOR RECONSIDERATION**

We, **Richard and Cathy Russell Fothergill, Rob and Stephanie Fothergill, and Catherine Russell**, continue our request for a contested case hearing. **Richard and Cathy Russell Fothergill** (with Cathy being the title holder) own the land that adjoins the west and south of the proposed wastewater treatment plant site. The proposed sewer treatment plant appears to be located only a matter of feet immediately north of the northeast corner of our property. A portion of the unnamed tributary and Big Sandy Creek Water Shed Project Site #35 (unnamed reservoir in the application) frontage mentioned as the first depository for the treated sewer water borders our property on the north side.

Cathy Fothergill's mother, **Catherine Russell**, resides on the land which she and her late husband, H. C. Russell, deeded to their daughter in a life estate. Catherine Russell's home is approximately 800 yards from the proposed sewer site.

Rob and Stephanie Fothergill, son and daughter-in-law of Richard and Cathy Fothergill and grandson and wife of Catherine Russell, own and reside on land that is also part of the family farm. The home where they live with their young daughter is approximately 400 yards from the proposed sewer plant site.

Together we raise beef cattle and have horses on our farm. We believe that the proposed sewer plant could easily have an adverse affect on the quality of our drinking water as well as our lifestyle. We have water wells on our farm that have never been located by the Applicant. Our family has recently participated in a \$40,000 federally funded soil and water conservation grant to fight erosion on our land and replant grass. Problems presented by treatment plant installation could lead to further erosion and destroy conservation measures we have put into practice. One of the justifications for the grant's approval was that our land would provide a habitat for wildlife. We believe that the sewer plant will drive wildlife from our farm and potentially contaminate drinking water for livestock and wildlife on our farm. We further enjoy outdoor activities on our farm. We believe that the sewer plant will create an intolerable odor that will make being outside on our farm extremely unpleasant.

We believe that the decision of the Executive Director issued on January 17, 2008, failed to consider many of the points we made in written and oral comments opposing the proposed permit WQ0014708001. Flagrant errors and misrepresentations in the

application were ignored in the decision. Testimony of adjacent landowners was disregarded in an apparent effort to accommodate the Applicant.

All five of us have been recommended by the Executive Director as having filed timely hearing requests in writing that comply with the requirements of 30 TAC Sections 55.201 (c) and (d). The Executive Director has also recommended that the Commission find all five of us as affected persons according to the factors in 30 TAC § 55.203.

In addition to the numerous errors and oversights, the Applicant (whose parent company supplies electric power, power lines, and regularly bills most of the landowners near the proposed sewer plant) seems to be unable to locate the land or homes of most of those affected. The first application failed to identify adjoining property owners, Thomas Long, Nancy Carnahan, Jana Woodruff, and Shawn and Deborah White. The revised landowner list submitted in July, 2007 is incorrect. A search of Wise County records fails to reveal that Larry Cole owns any of the land in question. C. A. Russell, who is listed as a landowner, died on March 16, 1978, having already given ownership of the land to his son, H. C. Russell, in 1975. It would be impossible for him or James Forbis, who is also deceased, to receive notices from TCEQ. Another error appears in the so-called revised landowner list in that the 267 acres of land to be developed appear on Wise County tax records belonging to J. K. Miller and Gary Shelton (not Gary S. Helton). It should be noted that neither of these owners is the Applicant. The Applicant is continually either careless or unconcerned regarding pertinent facts. The notice requirements for the application were never properly met. The landowner list and the map submitted with the response on May 23, 2008, are invalid. (Based on written TCEQ guidelines, fairness would dictate the voiding of their application.)

The map which was attached to the Executive Director's Response on May 23, 2008, provided by the Applicant incorrectly locates Cathy and Richard Fothergill, Catherine Russell, Rob and Stephanie Fothergill, and Joylynn Woodruff. We have provided TCEQ with correct maps enclosed with our responses in October, 2006; April, 2007; and February, 2008. Apparently our maps were never considered. The map requested by TCEQ Office of Legal Services and provided by the Applicant locates Cathy and Richard Fothergill and Catherine Russell on land owned by the Forbis/Long/Carnahan/Woodruff family. Rob and Stephanie Fothergill are located approximately 200 feet north and west of their actual home location making it appear that they are farther from the sewer's proposed site than they are. In 2006, they paid Wise Electric Coop to build an electric line to the house that their subsidiary cannot now locate. Catherine Russell's home is located immediately north of the intersection of CR 2175 and CR 2195. Joylynn Woodruff lives close to the east side of the intersection of Old Decatur Road and CR 2175.

We object to the Executive Director's finding that Ann Jolley, Deborah White, Kevin Smith, and Gordon and Roxie Ploeger are not affected persons. All of these people reside and own property that is within one mile of the proposed sewer plant. Since the creek and reservoir are one body of water that does not flow (the water will sit stagnant)

there is no downstream or upstream. All nearby property owners are impacted by the proposed project.

We continue to ask that the permit be denied because of application errors, omissions, or mistakes. Beginning with the misspelling of the word "Appliation" [*sic*] and incorrect address of Brighton Water Systems, the application is fraught with inaccuracies. In spite of numerous efforts on our part to point out errors, the Applicant makes no effort to correct his application; and TCEQ continues to forgive or ignore these errors.

The most glaring inaccuracy is the characterization of the discharge route. The application calls it a stream, when in fact the construction of the dam which created the lake caused water to back into the "tributary" to the point where the effluent will be released. It is only about 200 yards from the entrance to the lake. The portion of the tributary bordering our property on the north has essentially become part of the lake with water levels of 10 to 12 feet deep and at least 120 feet wide. The width and level were evident at the time that the Applicant claims "personal observation" on March 9, 2006. In his application, the Applicant states that average stream width is 10 feet and average stream depth is 6 inches. Further, the Applicant swore under penalty of perjury that the West Fork of the Trinity River joins the receiving water within three miles; that the water body was dry with no flow present; that no uses were observed (that statement would be true since the Applicant obviously did no observation). The application should have been checked for livestock watering, contact recreation, and fishing. The Applicant checked Natural Area to describe the aesthetics of the receiving water when he should have checked Wilderness. In answer to the question "Do the receiving water characteristics change within three miles downstream of the discharge?", the Applicant checked "No." This totally ignores the presence of the 16-acre government sponsored conservation lake.

The discharge route was further classified as "intermittent". This body of water has not been dry since the dam was built in 1999. The submitted coordinates showing the location of the proposed sewer plant places it outside the property that is owned by the developer. We cannot be certain of the proposed location based on information in the application. Additionally, the owner of the land listed in the application is said to be Larry Cole (purchase is in negotiation). There is no evidence that Mr. Cole owns any property in the area.

When questioned orally during the public meeting on April 3, 2007, in Decatur, Texas, Mr. Rayce Cantwell admitted that he did not observe the receiving stream for the required three miles. He did, however, verify along with Mr. Coy Cleveland that the information provided on the application was true and correct again under penalty of perjury.

By submitting a signed and completed application, the Applicant certified under penalty of law that, to the best of their knowledge and belief, the information is true, accurate and complete. TCEQ states that in the event the Applicant or permittee becomes aware that it failed to submit any relevant facts in a permit application, or in any report to the Executive Director, it must promptly submit such facts or information. A permit may be

modified, suspended, or revoked, in whole or in part, if it is determined that the permit was obtained by misrepresentation or failure to disclose fully all relevant facts. We contend that this level of inaccuracy should cause TCEQ to deny the application. How can anyone, in good conscience, authorize the monitoring of a waste-water facility by a person who is hired by, or works for, an organization that is either unable (or unwilling) to provide true and accurate facts in an application?

We further contend that the draft permit is based on incorrect numerical models because incorrect information was provided to TCEQ by the Applicant. Therefore, the draft permit fails to satisfy regulatory requirements intended to protect water quality, human health, the environment, wildlife, and existing uses.

We also believe that the proposed activity will result in a trespass on private property and create a nuisance preventing our enjoyment of our land. The proposed dumping of 75,000 gallons of effluent into our creek will violate an easement entered into by H. C. and Catherine Russell, James Forbis, and C. L. Gage (previous owner of the developer's land) giving the right to control the level of water impounded by Big Sandy Watershed #35 to Wise County Water Control and Improvement District #1 and Wise Soil and Water Conservation District.

TCEQ staff reportedly visited the Applicant's and Thomas Long's property prior to the public meeting on April 3, 2007. During this visit, staff was able to see the front of the Applicant's development and the reservoir. Staff did not see the specific proposed facility site during the visit. The heart of this matter involves disputed descriptions of the proposed discharge route. Landowners are providing TCEQ with true and correct descriptions of the discharge route. We have provided photographs to refute the poorly done two exhibits included by the Applicant in his application. These two application photographs cannot have been taken at the same location where the Applicant now says is the point of discharge. We contend that TCEQ cannot make a fair decision without a personal on-site examination of the proposed site.

Regarding the salinity levels, bacterial contamination, algae, and phosphorous levels that would be safe for cattle, measurement at the point of discharge is not sufficient. Since the water does not flow any pollutants released will build up over time making the water unsafe for livestock and wildlife to drink. Again, the permit and numerical model is based on non-existing data. The proposed requirement for the Applicant (who cannot locate property owners nor provide correct information) to make monthly reports to TCEQ regarding the quality of our water is simply not enough.

The Public Interest Counsel has apparently confused Catherine Russell and Cathy Russell Fothergill. We believe that Catherine Russell should be included on the list of affected persons for a contested case hearing. Likewise, Gordon and Roxie Ploeger, Kevin Smith, Deborah White, and Jana Woodruff are also affected persons.

Analysis of the Applicant's Response to Requests for Hearing

It would appear that the Applicant is not using his own map and landowner list to ascertain true ownership status of requestors. We contend that "affected person" status should be granted to Mrs. Deborah White, whose property is adjacent to the proposed sewer site and whose house is approximately 300 yards from the site. On page 4 of his analysis, Applicant's attorney listed 15 requestors who timely submitted requests for a contested case hearing. Mr. Kevin Smith is #3 on the list. On page 5, Applicant states that based on records from the Chief Clerk, there is no indication that Mr. Smith filed any public comments. Mr. Smith's land and home are within $\frac{1}{4}$ to $\frac{1}{2}$ mile of the proposed facility. Mr. Smith is an affected person.

On Applicant's submitted map, Ann Jolley's home is correctly located within the one mile radius of the proposed plant. However, on page 6, Applicant states that her property description places her approximately one mile or more from the proposed facility. Mrs. Jolley is also an affected person.

Wise County Water Control and Improvement District #1 has a justifiable interest in the pending application through its sponsorship of the lake and by holding an easement signed by the previous owner of the developer's land, as well as two other landowner groups. According to the Texas Agriculture Code § 201.101, a conservation district may require owners or occupiers of land to enter into and perform an agreement or covenant as to the permanent use of land that will tend to prevent or control soil erosion on that land. The easement does authorize the District to control water levels impounded by Big Sandy Watershed #35. Additionally, it is impossible to release water coming into the "impoundment". The water will only be released from the lake when and if it should reach flood stage.

Applicant's characterization of the Forbis group appears to be an attempt to eliminate the owners of the lake property from contention. Clearly, Althea Forbis, Dr. Thomas Long, Jana Woodruff, and Nancy Forbis Carnahan are affected persons and this fact is well known to the Applicant.

Rob and Stephanie Fothergill are owners of a fourteen acre tract that is part of the Fothergill/Russell farm. Rob Fothergill manages the farm. Rob and Stephanie Fothergill live only about 400 feet from the proposed sewer site. Because of their proximity to the proposed site, their health, use of property, livestock, and enjoyment of their property will be adversely affected by this proposal. Rob and Stephanie Fothergill should be included as "affected persons" and granted a contested case hearing.

In addition to the eight points considered relevant by the Applicant, we respectfully request that the Commission recognize issues related to effects on the LBJ Grasslands and the easement entered into by landowners and Wise County Water Control and Improvement District #1 in 1994. We further believe that the Applicant may not lawfully

discharge into the receiving body of water. We also ask the Commission to consider the incompetency of the Applicant to operate the proposed facility based on his inability to provide accurate information in the application.


Based on these and previous written and oral comments by members of the Fothergill/Russell family, we request that the Commission grant our request for a contested case hearing.

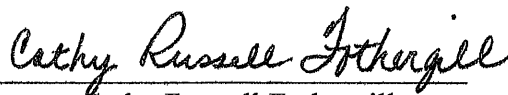
Respectfully submitted,

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By: 
Richard Fothergill
June 3, 2008


Cathy Russell Fothergill
June 3, 2008

ATTACHMENT A



No.1 Looking North. Rob and Stephanie Fothergill's house in the tree line.
Located @ 400 yards from discharge point. Water well located 350 yards from point
where discharge route passes onto farm.



No. 2 Looking North from the Conservation Lake Dam



No. 3 Looking East from the dam—toward proposed discharge point.



No. 4 Midway between lake opening and proposed discharge site.
Width - 114 ft. Depth 10 ft.



No. 5 View from top of pond dam on Russell/Fothergill farm where route passes onto that property. Width 120 ft.—Depth 10 ft.+



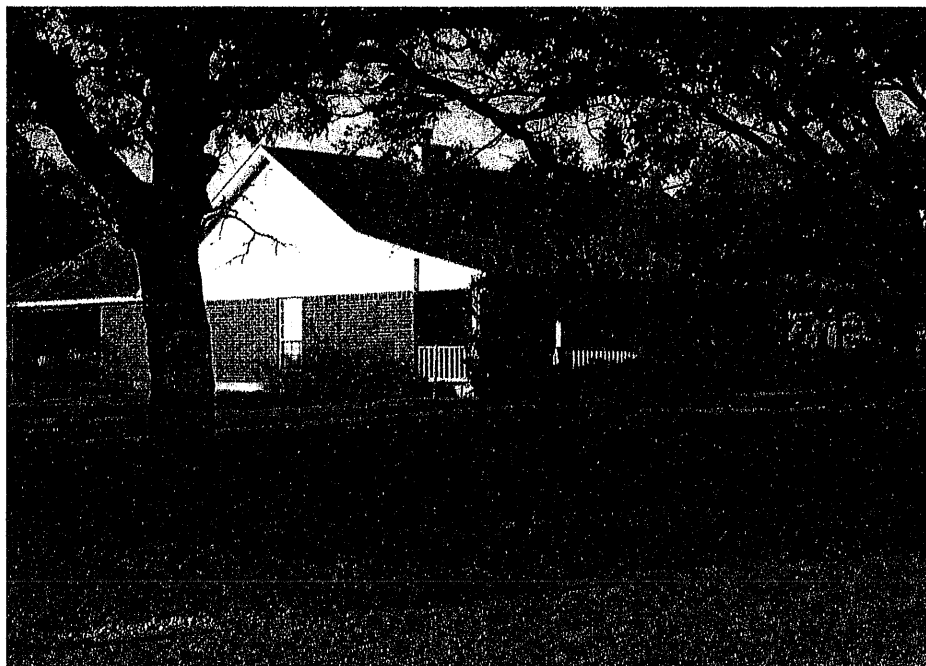
No. 6 View at the proposed discharge site. Width 44 ft. Depth 8 – 10 ft.



No. 7 Looking downstream at point of discharge.
Distance of 120 feet to the base of tree in the distance.



No 8. Looking east "upstream" from discharge point.
Water depth 6ft.



No. 9 The Home of Catherine Russell at the intersection of CR 2195 and CR 2175.
Approximately 800 yards south of proposed site. (Mailbox where Wise Electric (Water)
sends electric bill is just off the picture on the left!)

ATTACHMENT B MAP OF PROPOSED SEWER PLANT AREA

